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THE
AMERICAN LAW REGISTER.

AUGUST, 1870.

RESTRAINTS UPON THE ALIENATION AND
ENJOYMENT OF ESTATES.

(Continued from July Number.)

13. We have endeavored to show from the authorities submitted, in what light *general* restraints against alienation, both voluntary and involuntary, are regarded. The readers' attention is now invited to the consideration of those *special* or partial restraints upon the alienation and enjoyment of estates which are approved by the law. They usually take the form of prohibitions or conditions against alienation for a certain length of time, or to certain persons, or against certain uses of the estate granted. Some of these prohibitions rest upon the incapacity of the donee, and seem created for his or her protection.

The authorities seem to concur in the approval of *partial* restraints; but it is impossible to lay down any rule indicating the length of time which may be safely covered by these restraints. Nothing more definite can be given than that the donee may be restrained from aliening for a reasonable length of time. A condition to an estate in fee, that the donee should not sell until he should attain the age of twenty-five years, was pronounced valid, and his deed made before that time declared void: *Dongal v. Frazer*, 3 Mo., 40. The doctrine of partial restraints as laid down in this case, was approved in *Collins v.*

Clamorgan, 5 Mo., 273, and *Collins v. Clamorgan*, 6 Mo., 170. Whether a restraint against alienation annexed to a fee simple estate, can be extended to the period of a life or lives in being, is a question upon which the authorities are divided. It has been said, in some cases, that such a restraint is not too general provided it does not extend beyond the period defined as the limit against perpetuities—that is a life or lives in being and twenty-one years after : *Mc Williams v. Nisly*, 2 S. & R., 507 ; *Baker v. Cobb*, 36 N. H., 345 ; *Simonds v. Simonds*, 3 Metc., 562. It is certain that such a restriction is not objectionable on the ground of violating the rule against perpetuities. There is a distinction however, between restraining the owner of a fee simple estate from disposing of it during his life, and restraining the owner of a life estate from a similiar disposition during his life. In the former case the grantor retains no interest in the estate granted and can arrogate no right to restrict its alienation or use. In the latter case he retains the reversion and the fee, and cannot be said to be indifferent as to the disposition and enjoyment of the land by his tenant. The better view inclines to a disapproval of such a restriction as repugnant to the estate granted, and an unreasonable abridgment of the right of alienation : *Walker v. Vincent*, 7 Harris, 369 ; *Reifsnyder v. Hunter*, 7 Harris, 41 ; *Jauretsche v. Proctor*, 48 Penn. 466 ; *Gleason v. Fayerweather*, 4 Gray, 388 ; *Rochford v. Hockman*, 10 Eng. L and E., 64 ; S. C., 9 Hare, 475.

14. It must be admitted that the authorities are numerous enough to sustain a great many partial restrictions upon the alienation and enjoyment of estates, where they are manifestly repugnant to the nature of the estate granted. A condition attached to a fee simple estate that the grantor should erect a school-house, was held valid and the estates declared forfeited by his failure to comply with the condition within a reasonable time : *Hayden v. Stoughton*, 5 Pick., 528. A condition that no window should be made in the north wall of the house, nor of any house to be erected on the premises within twenty years, was approved as not unreasonable: *Gray v. Blanchard*, 8 Pick., 284. A condition in a conveyance to a road corporation that they should seasonably maintain their road, was held valid :

Cornelius v. Ivins, 2 Dutch., 376. A conveyance on condition that the grantee should keep a saw-mill and grist-mill doing business on the premises, was held subject to forfeiture for non-performance of the condition: *Lessee of Sperry v. Pond*, 5 O., 387. Conditions that the grantee should not carry on a particular trade within a reasonable district: 2 Preston Abs., p. 184; *Cheesley v. Langley*, 1 Roll. Abr., 427, or that no ardent spirits should be kept or sold on any part of the premises: *Collins Manufacturing Co., Murry*, 25 Conn., 242, have been held valid. It was recently held that an estate might be given on condition that the grantee should continue to reside on the premises and provide for the support and maintenance of the grantor, which necessarily implied that there should be no alienation, until the obligation of the condition was determined by release or death of the grantor: *Eastman v. Batchelder*, 36 N. H., 141. It has been frequently held that devises might be made upon condition, that the devisee should not contest the will or assert certain claims against the estate of the testator: *Cook v. Turner*, 15 M. & W., 727; *Chew's appeal*, 45 Penn., 228; *Rogers v. Law*, 1 Black, U. S., 253; *Lloyd v. Branton*, 3 Merivale, 118.

15. Special restraints against the alienation and enjoyment of estates are frequently imposed for the benefit and protection of persons not *sui juris*. They are necessarily of a limited duration, because they are imposed upon the person receiving the estate, and do not follow the fee beyond his existence. A devise to a minor, that he shall not come into possession, occupy or have advantage, except through his guardian is valid: *Smithwick v. Jordan*, 15 Mass., 113. In the case of married women, restraints may be imposed during coverture: 11 Jarman Con., 552, note a., where such restrictions are imposed in general terms, they are valid during coverture, but without effect both before and after coverture: *Tullett v. Armstrong*, Mylne & Cr., 390, S. C., 1 Beav., 2; *Barton v. Bristol*, Jacobs, 603.

16. In England and in most of the states, the creation of a separate estate in a married woman, does not of itself present any restriction against the alienation of it. The power to

alienate and burden it, is conceded as an incident of its creation, unless it is expressly withheld. Now, in respect to all restrictions, withholding from her the power to alien and burden it with her obligations, they are very generally approved and sustained during coverture, but disapproved both before and after coverture. During her discoverture, all such restrictions are as invalid as when attached to the estates of any person *sui juris*; *Woodmeston v. Walker*, 2 Rus. & Myl., 197; *Brown v. Pococke*, 2 Rus. & Myl., 210; *Jones v. Salter*, 2 Rus. & M., 208; *Newton v. Reid*, 4 Sim., 14; *Clark v. Wyndham*, 12 Ala., 798. Thus we perceive that because the law imposes upon her, for her protection, a general restraint measured by the duration of her coverture, the grantor is upheld in imposing additional, reasonable restraints for her welfare and security, during this period of her disability.

17. When *special* restraints contravene the policy of the law, they are void in like manner with general restraints of a similar nature. Of this class, restraints in the nature of injunctions, conditions and covenants against marriage, may be alluded to. Reference is now made to only such as are known in the law as conditions subsequent, operating upon the estate already vested. When they are imposed upon estates given to unmarried women, they are void, unless justified by the peculiar circumstances of the case in which they are imposed: *Scott v. Taylor*, 2 Brown, C. C., 431. *Mosley v. Reynolds*, 2 Hare, 570; *Common v. Stouffer*, 10 Barr, 350; *Phillips v. Mead*, 7 Conn., 588; *Parsons v. Winslow*, 6 Mass., 169; *Bennett v. Robinson*, 10 Watts, 348. But where the restriction is in the form of a condition, imposed by the husband against the marriage of his widow, with a forfeiture or termination of the estate resulting from a breach, the weight of authority approves it as valid. In other words restraints against the enjoyment of property, in the shape of conditions against second marriages, when imposed by the husband upon his widow, are not against the policy of the law: *Dumey v. Schaeffer*, 24 Mo., 170; *Craven v. Brady*, Law Rep., 4 Eq. Cas., 209; *Vance v. Campbell*, 1 Dana, 229; *Rogers v. Am. Board*, 5 Allen, 69; *Doyall v. Smith*, 28 Ga., 262; *Vaughan v. Lovejoy*, 34 Ala., 437; *Pringle v. Durkey*, 4 Smed.

& M. In *Commonw. v. Stauffer*, 10 Barr, Penn., 350, Chief Justice GIBSON adds the weight of his distinguished name to this proposition, in an opinion eminently clear and forcible. It is not to be inferred from these cases that this doctrine could be invoked against the second marriage of surviving husbands. A restraint against marriage, imposed upon the estate of a grandson, was recently held void: *Otis v. Prinu*, 10 Gray, 581.

A condition that a legacy to a daughter should be forfeited on her becoming a nun, was held good, although there was no limitation over: *Dickson's trust*, 1 Eng., L. & Eq., 149.

18. The doctrine of partial or particular restraints, as developed in the authorities submitted, took its origin in the *Larges' case*, decided by the Queen's Bench in the reign of Elizabeth: 2 Leon., 82; 3 Leon., 182. Restraints upon the assignment of leases, (Dyer 6, a.; 1 And. 123, 124) and against the pursuit of certain trades upon the premises, were of ancient origin: *Chesley v. Langley*, 1 Rol. Abr., 427.

In the *Larges' case* the testator devised his lands to his wife until his son William should attain the age of twenty-two years, remainder as to a portion of his lands to two sons, and as to another portion, to two other sons, upon condition that if any of his sons should, before William reached the age of twenty-two years, sell or go about to sell his respective estate, he should forever lose the same, in which event it was to go over to another. Before his son William attained the age of twenty-two years, one of the sons leased his lands for sixty years, and so and from sixty years until two hundred and forty years. The condition was held valid, and the lease declared a substantial breach of it. This case is usually cited in support of the doctrine of partial restraints. It is not, however, a very pointed authority in support of subsequent conditions against alienation. For the estate that was defeated had never vested in possession, and the vesting was made dependent upon this condition, which was in the nature of a condition precedent to the full seizin of the land by the son, whose act defeated it before the time had arrived for its enjoyment as an estate in possession.

19. It must be admitted that all restraints, however partial or particular, when attached to fee simple estates vested in persons *sui juris*, are, in the logic of the law, as repugnant to the nature of such estates, as if they were general and co-extensive with their duration, and were unreasonable and arbitrary. A restriction that the donee of a fee simple estate shall not have the right to sell it for a single day, is as repugnant to the constituent elements of the estate as a condition that he shall never dispose of it, for in the gift he is vested with the right to alien, as much as he is vested with the land, and any condition against the exercise of this right, is only an attempt to except what has been already given. This reflection is perhaps more easily accepted in its application to personal property, which, on account of its perishable nature, does not afford so convenient a subject for restraints and limitations. Where a thing is given and then by a subsequent clause the very thing itself is excepted, the exception is void, as repugnant to the gift. All conditions repugnant to the absolute gift of personal property are void: *Bradley v. Peixote*, 3 Ves., 324; *Cuthbert v. Perrin*, Jacob, 415; *Weatherby v. Weatherby*, 13 S. & M., 685; *Barksdale v. Elam*, 30 Miss., 694; *Britton v. Twining*, 3 Meriv., 176; *Billing v. Billing*, 5 Sim., 232; *Ross v. Ross*, 1 Jac. & W., 154. It has also been decided that restraints against the assignment of choses in action are void. The claim of a policy holder prior to loss, may be restrained from assignment, for reasons inherent in the nature of the contract, which is still executory and rests upon the confidence and trust between the parties which first gave rise to it. But after loss, it is a fixed claim and presents no reason against its unrestricted alienation: *Goits v. Nat. Ins. Co.*, 25 Barb., 189; *Curtney v. N. Y. L. Ins. Co.*, 28 Barb., 116. A different, but, as we think, untenable view has been taken of this proposition by some courts: *Dey v. Poughkeepsie M. Ins. Co.*, 23 Barb., 623; *Hobbs v. Memphis Ins. Co.*, 1 Snead, 444.

Notwithstanding these objections the doctrine of particular or partial restraints, must be accepted as established by the authorities. But the bounds within which it prevails are not

very clearly defined, an inconvenience which must attend every doctrine, which is not founded on logical principles. Modern conveyances of fee simple estates, especially in cities, are often burdened with restrictions against the exercise of certain trades and occupations upon the premises, as well as covenants and conditions relating to the improvement of the property; as for instance that the dwellings shall be of certain dimensions and material, and be located a certain distance from the street. To what extent and within what bounds these restrictions may be enforced is a subject upon which a lawyer cannot advise with much confidence or satisfaction. A full consideration of them is not within the scope of our discussion. A. M.

(To be Continued.)

RECENT AMERICAN DECISIONS.

Supreme Court of California.

GALLAND v. GALLAND.

A court of equity has jurisdiction to decree alimony to a wife on petition, though no divorce is asked.

A statute authorizing the courts of a state to grant alimony in suits for divorce does not thereby prohibit the granting of alimony in other cases.

This was an action by a wife against her husband for permanent alimony. The substance of the complaint was as follows: That plaintiff and defendant became husband and wife in the kingdom of Prussia in the year 1859, and immediately removed to California, from which time they continued to live together as man and wife till November, 1864, and by their united exertions acquired property of the value of twenty thousand dollars, which property consisting of money, stocks, notes and other personal securities, was entirely in the hands and under the control of defendant; that in the month of November, 1864, defendant, without cause, drove plaintiff from his house, and ever since has refused to allow her to return; that since the separation, as aforesaid, the defendant has supplied her with \$77 per month for the maintenance of herself and child, but threatens to reduce or wholly deprive her of this allowance